


Spring 3-1-2003

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Recommended Citation

Thomas A. Mayes, *Denying Special Education in Adult Correctional Facilities: A Brief Critique of Tunstall v. Bergeson*, 2003 BYU Educ. & L.J. 193 (2003).

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DENYING SPECIAL EDUCATION IN ADULT CORRECTIONAL FACILITIES: A BRIEF CRITIQUE OF *TUNSTALL V. BERGESON*

Thomas A. Mayes*

I. INTRODUCTION

In 1998, the State of Washington passed a statute that effectively limited public education in adult correctional facilities.¹ Under this statute, individuals under eighteen who are confined in Washington adult correctional facilities are still entitled to educational services. However, all other inmates, even those with disabilities, are no longer entitled to educational services.² Following this statute's enactment, Washington State inmates filed a class action against the State, attacking the validity of the statute on multiple grounds. In the resulting case, *Tunstall v. Bergeson*,³ a divided Washington Supreme Court upheld the validity of the statute on all contested grounds.

The state Supreme Court's disposition of the case subjected it to varying degrees of criticism,⁴ the most substantial deriving from the Individuals with Disabilities Education Act⁵

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1. 1997 Wash. Laws ch. 338, § 7, codified at Wash. Rev. Code ch. 28A.193 (2002).

2. Wash. Rev. Code § 28A.193.005 (2002).

3. *Tunstall v. Bergeson*, 5 P.3d 691 (Wash. 2000), cert. denied, 532 U.S. 920 (2001).

4. The other claims advanced by the class concerned the right to regular and special education under state statute, the right to regular and special education under the Washington constitution, and rights under Section 504 of the Rehabilitation Act (29 U.S.C.A. § 794 (West 1985 & Supp. 1997)).

5. 20 U.S.C.A. § 1400-87 (West 1990 & Supp. 1998).

(hereinafter referred to as “the IDEA”).⁶ Essentially, denying special education to incarcerated youth with disabilities, ages eighteen to twenty-one, runs contrary to the language and structure of the IDEA.⁷ In light of the *Tunstall* decision,⁸ this Article considers whether the Washington statute governing education in adult correctional facilities embodies sound law and good public policy.⁹ After examining the IDEA and its implementing regulations, it is apparent that the Washington statute is in conflict with the IDEA¹⁰ and is fundamentally misguided as a matter of public policy.¹¹

II. BACKGROUND

In March of 1998, the Washington legislature passed a statute that required the Washington State Department of Corrections to provide education to juveniles under eighteen, incarcerated in an adult facility.¹² The statute effectively

6. See *State Statute KOs Services to Incarcerated Students Ages 18-22*, 16. The Spec. Educator (Aug. 29, 2001).

7. See e.g. Loren Warboys et al., *California Juvenile Court Special Education Manual* (1994); Peter E. Leone et al., *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. Rev. 389 (1995); Kathleen Kelly, *The Education Crisis for Children in the California Juvenile Court System*, 27 Hastings Const. L.Q. 757 (2000); Thomas A. Mayes, *Persons with Autism and Criminal Justice: Core Concepts and Leading Cases*, 5 J. Positive Behavior Interventions ____ (forthcoming 2003); Thomas A. Mayes & Perry A. Zirkel, *The Intersections of Juvenile Law, Criminal Law, and Special Education Law*, 4 U. Cal. Davis J. Juv. L. & Policy 125 (2000); T. Rowand Robinson & Mary Jane K. Rapport, *Providing Special Education in the Juvenile Justice System*, 20 Remedial & Spec. Educ. 19 (1999); Dominga Soliz & Noah Cutler, Student Authors, *Disabled Youth, Incarceration, and Educational Challenges*, 5 U. Cal. Davis J. Juv. L. & Policy 265 (2001). For an article suggesting that schools and the juvenile justice system “criminalize low student achievement,” see Augustina H. Reyes, *Alternative Education: The Criminalization of Student Behavior*, 29 Fordham Urb. L.J. 539, 555 (2001).

8. See *infra* Part II discussing *Tunstall*.

9. See *infra* Part III critiquing *Tunstall*.

10. See *infra* Part III.C. A state law or policy may not conflict with the IDEA. See Thomas A. Mayes & Perry A. Zirkel, *State Educational Agencies and Special Education: Obligations and Liabilities*, 10 B.U. Pub. Int. L.J. 62, 80-82 (2000).

11. See *infra* Part III.D.; see also Cynthia M. Conward, *Where Have All The Children Gone?: A Look At Incarcerated Youth In America*, 27 Wm. Mitchell L. Rev. 2435 (2001); Peter W. Greenwood, *Responding to Juvenile Crime: Lessons Learned*, Future of Children, Winter 1996, at 75; Kelly, *supra* n. 7; Jo Webber, *Comprehending Youth Violence*, 18 Remedial & Spec. Educ. 94 (1997).

12. Wash. Rev. Code § 28A.193.030 (2002). The statute allows the state Superintendent of Public Instruction to adopt rules to allow eighteen-year-old students in adult prisons to continue participation in such educational programs. Wash. Rev. Code § 28A.193.030(4). As applied to children with disabilities, this particular

denied educational services to inmates who had passed their eighteenth birthday. Denying educational benefits to this latter age group is extremely worrisome because in April 1998, for example, roughly one thousand inmates in Washington's adult prison system were eighteen through twenty-one.¹³ Of this age group, only one-fifth had earned a high school diploma or general equivalency diploma.¹⁴ A class of inmates aged eighteen to twenty-one brought an action shortly after the statute's passage. The trial court certified the following class:

All individuals who are now, or will in the future be, committed to the custody of the Washington Department of Corrections, who are allegedly denied access to basic or special education during that custody, and who are, during that custody under the age of 21, or disabled and under the age of 22.¹⁵

The case, *Tunstall v. Bergeson*, was tried on stipulated facts. On cross-motions for summary judgment, the trial court granted partial summary judgment to the plaintiff class and partial summary judgment to the State.¹⁶ The State appealed, and the plaintiff class cross appealed. On appeal and over ten months after oral argument, the Supreme Court of Washington, by a six-to-three vote, ruled in favor of the State on almost all grounds.¹⁷ On March 19, 2001, the United States Supreme Court denied the class's petition for a writ of certiorari.¹⁸

provision runs afoul of federal law to the extent that federal law requires special education for all children with disabilities under age twenty-two. It purports to make optional what federal law would require.

13. *Tunstall*, 5 P.3d at 695.

14. *Id.*

15. *Id.*

16. *Id.* at 696; see *Washington State Must Educate Juveniles in Adult Prisons*, *Court Rules*, *Correctional Educ. Bull.* 2 (no. 2) (Nov. 1998).

17. The *Tunstall* court reserved ruling on whether there was a constitutional right to special education for inmates between eighteen and twenty-two "until we have a case where the record and briefing are adequately developed." 5 P.3d at 695.

The dissent based its rationale on grounds other than the IDEA; therefore, it will not be extensively discussed in this article. *Id.* at 710-13.

18. 532 U.S. 920 (2001). A denial of a certiorari petition is not considered a decision on the merits of case, and has no precedential value. See e.g. *Hopfmann v. Connolly*, 471 U.S. 459, 461 (1985).

III. CRITIQUE OF THE *TUNSTALL* DECISION

Although the *Tunstall* case concerned multiple issues, this critique will focus on the most disturbing facet of the court's decision: the court's termination of education to inmates with disabilities who are eighteen through twenty-one.¹⁹ As this portion of the ruling is a matter of statutory interpretation and construction, one must first examine the relevant terms of the IDEA to determine if Washington's statute is even permissible.²⁰

A. *The Core Terms of IDEA*

The core terms of the IDEA, both before and after the 1997 IDEA amendments, are fairly straightforward. Each State receiving financial assistance under the IDEA is required to find and evaluate children with disabilities²¹ and provide those children with a "free appropriate public education" (hereinafter, "FAPE").²² Specifically, FAPE is specially designed instruction and necessary related services consistent with an Individualized Education Program (hereinafter IEP) provided in the least restrictive environment (hereinafter LRE).²³ As a general rule under the IDEA, FAPE is to be provided to all children with disabilities who are ages three through twenty-one.²⁴ Under certain circumstances, however, a State may decline to provide FAPE to children with disabilities who are ages three through five and eighteen through twenty-one "to the extent that [the IDEA's] application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public

19. Wash. Rev. Code ch. 28A.193 (2002).

20. For more information concerning statutory construction, see Thomas A. Mayes & Perry A. Zirkel, *Disclosure of Special Education Students' Records: Do the 1999 IDEA Regulations Mandate that Schools Comply with FERPA?* 8 J.L. & Policy 455 (2000).

21. See 20 U.S.C.A. § 1401(3); 34 C.F.R. § 300.7 (defining "child with a disability").

22. See 20 U.S.C.A. § 1401(8); 34 C.F.R. § 300.13 (defining "free appropriate public education"). For the leading case on what constitutes FAPE, see *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982). For information on the *Rowley* decision, see Perry A. Zirkel, *Building an Appropriate Education From Board of Education v. Rowley: Razing the Door and Raising the Floor*, 42 Md. L. Rev. 466 (1983).

23. See Mayes & Zirkel, *supra* n. 10, at 63-66 (summarizing State obligations under the IDEA).

24. 20 U.S.C.A. § 1412(a)(1) (2000); see also 34 C.F.R. § 300.121 (2001).

education to children in one or more of those age groups."²⁵

The 1997 amendments²⁶ to the IDEA made several pertinent changes concerning children with disabilities in adult correctional facilities. Initially, the amendments provided States with additional authority to limit the provision of FAPE to certain older children in adult prisons.²⁷ Specifically, 20 U.S.C. section 1412(a)(1)(B)(ii) allows states, by statute, to eliminate the right to FAPE for children with disabilities, aged eighteen through twenty-one, who "in the last educational placement prior to their incarceration in an adult correctional facility [were not] actually identified as being a child with a disability [and] did not have an IEP."²⁸ According to the legislative history, a child who was identified as a child with a disability who did not have an IEP in the most recent educational placement was not to be "excluded from services" under this provision.²⁹ In addition, an identified child with a disability who had an IEP in the last educational placement, before dropping out of school, remained entitled to FAPE.³⁰

Additionally, children with disabilities who are convicted as adults and incarcerated in adult prisons and who are entitled to FAPE are subject to additional restrictions contained in Title 20, United States Code, section 1414(d)(6).³¹ First, these children are not entitled to participate in state and district assessments.³² Second, transition planning for such a child is not required if that child's IDEA entitlement will end before the child's term of confinement will end.³³ Finally, the student's IEP team may modify, on a "temporary" basis,³⁴ the student's IEP or placement if the facility demonstrates "a bona fide security or compelling penological interest that cannot

25. 34 C.F.R. § 300.122(a)(1) (2001); *see also* 20 U.S.C.A. § 1412(a)(1)(B) (2000).

26. *Individuals with Disabilities Education Act Amendments of 1997*, Pub. L. No. 105-17, 111 Stat. 37 (1997).

27. 20 U.S.C.A. § 1412(a)(1)(B)(ii) (2000).

28. 34 C.F.R. §§ 300.122(a)(2), 300.311(a) (2001); *see also* 20 U.S.C.A. § 1412(a)(1)(B)(ii).

29. H.R. Rep. No. 105-95, at 91 (1997).

30. *Id.*

31. *See e.g. Letter to Anonymous*, 30 IDELR 607 (OSEP 1998); *Letter to Galaza*, 30 IDELR 50 (OSEP 1997).

32. 20 U.S.C.A. § 1414(d)(6)(A)(i) (2000); 34 C.F.R. § 300.311(b)(1) (2001).

33. 20 U.S.C.A. § 1414(d)(6)(A)(ii) (2000); 34 C.F.R. § 300.311(b)(2) (2001).

34. *Analysis of Comments and Changes*, 64 Fed. Reg. 12,537, 12,577 (Mar. 12, 1999).

otherwise be accommodated."³⁵ These three limitations do not apply to children in the juvenile system or to pretrial detainees.³⁶ In contrast to the provisions of Title 20 of the United States Code, section 1412(a)(1)(B)(ii) discussed in previous paragraphs,³⁷ which are limited to children who are eighteen to twenty-one, section 1414(d)(6) contains no lower age limit. The applicability of this provision depends on the age at which state law allows juveniles to be transferred to adult court.³⁸

Finally, the 1997 IDEA amendments allow states to transfer the supervisory responsibility for providing FAPE to "children with disabilities who are convicted as adults and incarcerated in adult prisons" to another state agency, such as the department of corrections or the department of public safety.³⁹ If that other state agency systematically violates the IDEA, "the United States Department of Education may only withhold a proportion of the state's IDEA funds equal to the proportion of children served by the other public agency, and any withholding may only effect the other public agency."⁴⁰

35. 20 U.S.C.A. § 1414(d)(6)(B) (2000); 34 C.F.R. 300.311(c) (2001). Administrative convenience or cost containment is not a sufficient interest under these provisions. See Mayes & Zirkel, *supra* n. 7, at 138-39. Any programming or placement change under these provisions must be made by the IEP team, not the facility warden or chief corrections officer. See Perry Zirkel & Thomas Mayes, *Are Inmates with Disabilities Entitled to Special Education?*, The Spec. Educator 3 (Aug. 29, 2000) (The State has the burden of proving the necessity of the proposed changes.).

36. See Mayes & Zirkel, *supra* n. 7, at 139.

37. See *supra* n. 27-30 and accompanying text.

38. For information on transfer to adult court, see Kevin J. Strom, *U.S. Dept. of Justice, Profile of State Prisoners under Age 18, 1985-97* (2000); Warboys, *supra* n. 7, at 54-56; Conward, *supra* n. 11, at 2440-44; Greenwood, *supra* n. 11, at 79; Mayes & Zirkel, *supra* n. 7, at 132-33; Brent Pattison, *Minority Youth in Juvenile Correctional Facilities: Cultural Differences and the Right to Treatment*, 16 L. & Ineq. J. 573, 575-76 (1998). The number of youthful defendants transferred to adult court has increased dramatically in recent years. Strom, *supra* n. 37, at 3. Empirical research suggests that transfer to adult court "has little if any deterrent effect on criminal behavior." Janet E. Ainsworth, *The Court's Effectiveness in Protecting the Rights of Juveniles in Delinquency Cases*, Future of Children 64, 69 (Winter 1996).

39. 20 U.S.C.A. § 1412(a)(11)(c) (2000); 34 C.F.R. § 300.600 (2001). This provision is primarily in response to California's objection to providing special education in adult prisons. See Mayes & Zirkel, *supra* n. 7, at 151-52. A state must elect to transfer supervisory authority to the other state agency. Such a transfer does not occur automatically. To the extent that authorities imply that such a transfer occurs without affirmative action by the state, those authorities are inconsistent with the plain language of the statute. Jean B. Crockett, *The Least Restrictive Environment and the 1997 IDEA Amendments and Federal Regulations*, 28 J.L. & Educ. 543, 556 (1999).

40. Mayes & Zirkel, *supra* n. 7, at 152 (citing 20 U.S.C.A. § 1416(c) (2000)); 34

Under this provision, inmates with disabilities confined to adult prisons affected by these sections remain entitled to FAPE⁴¹ and other enforcement mechanisms remain available.⁴²

B. *The Tunstall Court Ruling*

The *Tunstall* court ruled against the inmates with disabilities on claims under both the pre-1997 IDEA and the post-1997 IDEA.⁴³ The court claimed to ground its ruling on the pre-1997 claims on the Fourth Circuit's 1997 decision in *Commonwealth of Virginia Department of Education v. Riley*.⁴⁴ The *Riley* court held that the IDEA did not require states to provide FAPE to students expelled from school for conduct unrelated to their disability, as Congress did not explicitly condition receipt of IDEA funds on provision of FAPE to expelled students.⁴⁵ The *Tunstall* court analogized the termination of services to individuals with disabilities incarcerated in adult prisons and the expulsion of individuals with disabilities for conduct unrelated to their disability.⁴⁶ Regarding the post-1997 IDEA cases, the *Tunstall* court held, citing Title 20, United States Code, section 1412(a)(1)(B)(1), that providing FAPE to prison inmates with disabilities between the ages of eighteen and twenty-one would be "inconsistent with state law;"⁴⁷ consequently, it was not required.

C. *The Tunstall Decision is Bad Law*

Having previously considered the relevant text of the IDEA in detail,⁴⁸ one should consider whether the *Tunstall* decision can claim fidelity to the IDEA.⁴⁹ To the extent that it does not

C.F.R. § 300.587(e)(1999)).

41. *Analysis of Comments and Changes*, 64 Fed. Reg. at 12,644.

42. *Id.* It is important to note that this section would not authorize the complete cessation of educational services to adult prison inmates with disabilities. Subject to the other limitations contained in IDEA '97, these inmates remain entitled to FAPE. However, the remedy for denial of FAPE would lie against the "other state agency," not the SEA.

43. *Tunstall*, 5 P.2d at 705-06.

44. 106 F.3d 559 (4th Cir. 1997).

45. *Id.*

46. *Tunstall*, 5 P.2d at 705-06.

47. *Id.* at 706.

48. See *supra* n. 19-42 and accompanying text.

49. See generally Antonin Scalia, *A Matter of Interpretation: Federal Courts and*

conform to the boundaries of the text, it lacks legitimacy.⁵⁰ In doing so, one may be aided by several well-settled rules of statutory construction, the most important of which is that a clear, unambiguous statute must be enforced as written by the legislature.⁵¹ To determine the clarity of a statute and, if ambiguous, the permissible constructions of the statute, one must read an enactment in its entirety.⁵²

1. *The IDEA, as Amended*

Starting with the post-1997 IDEA, the law now in effect, it is clear that the State of Washington's decision to eliminate the provision of FAPE to many inmates with disabilities is not faithful to the terms of the IDEA. Specifically, the 1997 amendments allow state law to deny FAPE only to a narrowly defined subset of the inmate class—adult prisoners with disabilities, ages eighteen to twenty-one, who “in the last educational placement prior to their incarceration in an adult correctional facility [were not] actually identified as being a child with a disability [and] did not have an IEP.”⁵³ By limiting the breadth of this provision's reach only to a select portion of all inmates with disabilities, Congress clearly intended that the remaining inmates with disabilities retain a right to FAPE.⁵⁴

Further indication that the *Tunstall* class retained its right to FAPE is found in the limitations that Congress allowed to be placed on the provision of FAPE to children with disabilities confined to adult prisons after conviction as adults: limitations on participation in “high stakes” testing, elimination of the right to a transition plan in certain cases, and the ability to

the Law (Princeton U. Press 1997); Robert S. Summers, *Statutory Interpretation in the United States*, in *Interpreting Statutes: A Comparative Summary* 407-59 (D. Neil MacCormick & Robert S. Summers eds., Dartmouth Pub. Co. 1991).

50. See e.g. *U.S. Natl. Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 463 n.11 (1993).

51. See e.g. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997); *Conn. Natl. Bank v. Germain*, 503 U.S. 249, 253-54 (1992); see also Mayes & Zirkel, *supra* n. 20, at 458-59.

52. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991).

53. 34 C.F.R. §§ 300.122(a)(2) (2001), 300.311(a)(2) (2001); see 20 U.S.C.A. § 1412(a)(1)(B)(ii) (2000).

54. See e.g. Summers, *supra* n. 49, at 418. The particular rule of construction is often stated in Latin: “*expressio unius exclusio alterius* (mention of one excludes another).” Professor Summers states that this particular canon “seems to be taking on a new life.” *Id.* (citing *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 131-33 (1989)).

make short-term changes in a child's IEP or placement.⁵⁵ The fact that only these three elements of FAPE were restricted is an unmistakable indication that the remaining rights under the IDEA were not eroded.⁵⁶ As shown, the Washington state statute in question sweeps broader than permissible under the 1997 IDEA amendments.⁵⁷

Instead of relying on section 1412(a)(1)(B)(ii) in its decision, the *Tunstall* court relied on section 1412(a)(1)(B)(i), which allows states to deny special education to children with disabilities between the ages of eighteen and twenty-one if providing special education to those children "would be inconsistent with state law or practice, or the order of any court . . ."⁵⁸ The *Tunstall* court's reliance on this section, as well as its implementing regulations, is misplaced because it refers to broad age groups.⁵⁹ As a general rule, it allows states to limit special education to whole "age ranges" rather than particular subsets of age groups.⁶⁰ Rephrased, an inconsistent state law or court order will trump the IDEA's presumptive entitlement for children with disabilities aged eighteen to twenty-one *only if* it applies to all children within that particular age range.

For example, a state statute could permissibly forbid the provision of special education to all children with disabilities after their twentieth birthdays. By contrast, a state statute could not forbid the provision of special education in private residential facilities for children over eighteen. Hence, under

55. 20 U.S.C.A. § 1414(d)(6) (2000); 34 C.F.R. 300.311(b) (2001).

56. See e.g. Summers, *supra* n. 49, at 418.

57. In defending its statute, the State of Washington also relied on 20 U.S.C. § 1412(a)(1)(B)(ii). Notably, section 1412(a)(1)(B)(ii) would have only saved a portion of the Washington statute. See *supra* n. 27-30.

58. 20 U.S.C.A. § 1412(a)(1)(B)(i) (2000); 34 C.F.R. § 300.122(a)(1)(2001).

59. 20 U.S.C.A. § 1412(a)(1)(B)(i) (2000); 34 C.F.R. § 300.122(a)(1) (2001).

60. 20 U.S.C.A. § 1412(a)(1)(B)(i) (2000). Two pre-IDEA '97 cases construing this section's statutory predecessor were cited by the *Tunstall* court in support of its decision. *Tunstall*, 5 P.3d at 706 (citing *Yankton Sch. Dist. v. Schramm*, 93 F.3d 1369 (8th Cir. 1996); *Timms v. Metro. Sch. Dist.*, 722 F.2d 1310 (7th Cir. 1983)). A careful reading of both cases shows that they undermine, rather than buttress, the *Tunstall* court's rationale. To varying degrees, each case stands for the proposition that the current section 1412(a)(1)(B)(i) applies to broad age ranges, not the subset involved in *Tunstall*. See *Yankton Sch. Dist.*, 93 F.3d at 1376-77 ("An exception exists where state law or practice does not provide for [FAPE] for students between the ages of 18 and 21."); *Timms*, 722 F.2d at 1313-14 ("... unless providing [FAPE] to children aged . . . eighteen to twenty-one would be inconsistent with state law or practice or a court order").

he plain language of statute in question,⁶¹ if the state provides special education to some members of an age group, it must provide special education to *all* members of that age group. Washington does provide special education to some students aged eighteen to twenty-one,⁶² so it must provide special education to all students aged eighteen to twenty-one. The statute in question in *Tunstall* does not concern all children within a particular age range. Consequently, section 412(a)(1)(B)(i) does not provide the authority for this policy choice as made by the State of Washington.

Even if the plain language of this statute did not refer to broad age groups, but rather fractions of age groups, the implementing regulations⁶³ adopted by the U.S. Department of Education support this interpretation. Congress has empowered the United States Department of Education to issue regulations to enforce the IDEA,⁶⁴ and the judiciary largely defers to the Department's interpretation and implementation of the statute.⁶⁵ One of the relevant IDEA regulations states:

If State law or a court order requires the State to provide education for children with disabilities in any disability category in any of these age groups, the State must make FAPE available to all children with disabilities of the same age who have that disability.⁶⁶

Therefore, if the state of Washington provides FAPE to non-incarcerated children with disabilities in all disability categories in the age groups in question, under this federal regulation, it *must* provide special education to *all* children with disabilities in the subject age ranges, incarcerated or not.⁶⁷

61. An unambiguous statute is enforced according to its plain meaning. See *supra* n. 51 and accompanying text.

62. Wash. Rev. Code § 28A.155.020(2002); Wash. Admin. Code §§ 392-172-114 to 392-172-148 (2001).

63. 34 C.F.R. §§ 300.122; 300.300 (2001).

64. 20 U.S.C.A. §§ 1406, 1417(b) (2000). Under the "Chevron" doctrine concerning the validity of agency regulations, a regulation, within the province of the agency to promulgate, will only be invalidated if it is contrary to the plain language of an unambiguous statute or is an unreasonable construction of an ambiguous statute. See *Chevron U.S.A., Inc. v. Nat. Resources Def. Council*, 467 U.S. 837 (1984). For more information on the *Chevron* case, see Mayes & Zirkel, *supra* n. 20, at 463-65.

65. See generally Mayes & Zirkel, *supra* n. 20.

66. 34 C.F.R. § 300.300(b)(1) (2001).

67. For age ranges and categories of disability, see Wash. Rev. Code § 28A.155.020 (2002); Wash. Admin. Code §§ 392-172-114 to 392-172-148 (2001).

Additionally, the IDEA regulations provide that a state is not required to provide FAPE to children with disabilities, aged eighteen through twenty-one, if "State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to nondisabled children in that age group."⁶⁸ Under Washington's Basic Education Act, students under age twenty-one *are entitled* to attend public school,⁶⁹ and the State of Washington makes adult education broadly available through community colleges and local school districts⁷⁰ (often at no cost),⁷¹ including high school completion courses for students who are twenty-one years or older.⁷² The State of Washington makes public funds available to educate persons without disabilities in the relevant age group. Thus, there is no "State law" prohibiting expenditures of public funds for such a purpose.⁷³

Finally, the IDEA regulations state that the provision of FAPE to children with disabilities between the ages of eighteen and twenty-one is not required if that "requirement is inconsistent with a court order that governs the provision of free appropriate public education to children with disabilities in that State."⁷⁴ In *Tunstall*, there was no particular court order⁷⁵ governing special education that would be inconsistent with providing FAPE to the inmates with disabilities, in the

68. 34 C.F.R. § 300.300(b)(5)(i) (2001).

69. Wash. Rev. Code § 28A.150.220(3) (2002).

70. Wash. Rev. Code § 28B.50.030(12) (defining "adult education"); Wash. Rev. Code . § 28B.50.250 (allowing local school districts to offer adult education if not in conflict with programs offered by local community college); Wash. Admin. Code §§ 180-72-040 to 180-72-070 (2001) (implementing regulations).

71. Wash. Admin. Code § 131-28-026(4)(a) (2001) ("no charge" for "adult basic education" at community and technical colleges).

72. Wash. Rev. Code § 28B.50.030(12) (2002); Wash. Admin. Code § 180-72-050 (2001).

73. The *Tunstall* majority excluded inmates, over age eighteen, in adult correctional facilities from the scope of the Basic Education Law's guarantee of education up to the twenty-first birthday. *Tunstall*, 5 P.3d at 696-98. For purposes of 34 C.F.R. § 300.300(b)(5)(i) (2001), however, this is irrelevant. Under that rule, State law may eliminate the right to FAPE for children with disabilities in the relevant age ranges only if the State does not provide public funds for the education of *any* student without a disability in the age ranges in question. Washington cannot make such a claim, and cannot avail itself of § 300.300(b)(5)(i).

74. 34 C.F.R. § 300.300(b)(5)(ii) (2001).

75. There is no court order or decree similar to the now-familiar decrees in *Pa. Assn. for Retarded Children v. Commw.*, 343 F. Supp. 279 (E.D. Pa. 1972), or *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

subject class. Rather, there is only a judicial opinion rejecting challenges that a statute is impermissible under the IDEA. If "court order" were interpreted in such a manner, it would be an invitation to lawlessness. Should that interpretation prevail, no IDEA requirement would be secure for children with disabilities in the subject age groups. The state could pass a statute eliminating any IDEA right for children in the subject age group, and a reviewing court could cloak the offensive statute in the garb of a "court order."

There is an additional canon of statutory interpretation and construction that undermines the *Tunstall* court's interpretation of the IDEA, as amended. If section 1412(a)(2)(B)(i) and its implementing regulations had the meaning ascribed to them by the *Tunstall* court, then the amendment adding section 1412(a)(2)(B)(ii) would have been superfluous. Section 1412(a)(2)(B)(i) is identical to language from the pre-1997 IDEA.⁷⁶ If that section provided the authority for States to cease providing special education to all children with disabilities in adult prisons after their eighteenth birthdays, then why did Congress add section 1412(a)(2)(B)(ii) giving the States a much more limited right to deny FAPE to a less expansive group of inmates with disabilities?

It is a fundamental principle of statutory interpretation and construction that each provision of a statute "must, if possible, be construed in such a fashion that every word has some operative effect."⁷⁷ Furthermore, Congressional amendments are presumed "to have real and substantial effect."⁷⁸ Hence, section 1412(a)(2)(B)(ii) must have some practical significance. By enacting that section, Congress provided the strongest possible evidence that section 1412(a)(2)(B)(i) provided no authority to Washington to eliminate the provision of FAPE to inmates with disabilities in adult prisons who are eighteen years old or older.

The *Tunstall* court's decision is further eroded by the

76. See 20 U.S.C.A. § 1412(2)(B) (1994).

77. *U.S. v. Nordic Village Inc.*, 503 U.S. 30, 36 (1992); accord *Mt. St. Tel. & Tel. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979).

78. *Stone v. Immigr. & Naturalization Serv.*, 514 U.S. 386, 397 (1995); accord *Sutton v. U.S.*, 819 F.3d 1289, 1295 (5th Cir. 1987); Model Statutory Construction Act § 13(2), 14 U.L.A. 389, 401 (1990) ("In enacting a statute it is presumed that (2) the entire statute is intended to be effective.").

prominent position adult correctional facilities have in the IDEA and in the implementing regulations. First, representatives of adult correctional facilities are required members on each State's special education advisory board.⁷⁹ Second, the IDEA applies to, and the State is responsible for, supervising "all educational programs for children with disabilities in the State, including all such programs administered by any other State or local agency."⁸⁰ This includes adult correctional facilities,⁸¹ a point explicitly stated in the IDEA regulations.⁸²

Under the IDEA, as amended in 1997, a state may not deny FAPE to all children with disabilities, aged eighteen through twenty-one, incarcerated in adult prisons.⁸³ On this point, the *Tunstall* court erred and the decision should not be followed in other jurisdictions.

2. Pre-1997 IDEA.

To the extent this inquiry is relevant,⁸⁴ the pre-1997 IDEA does not sanction the State of Washington's statute any more than does the post-1997 IDEA. First, the IDEA provision relied on by the *Tunstall* court,⁸⁵ section 1412(a)(2)(B)(i), existed in identical form prior to the 1997 Amendments.⁸⁶ As noted above, this statute does not allow for the suspension of special education for children with disabilities, as in the *Tunstall* class.⁸⁷

The *Tunstall* court's reliance on the Fourth Circuit's decision in *Commonwealth v. Riley*⁸⁸ is also misplaced. The *Riley* court held that students with disabilities "expelled or suspended long-term due to serious misconduct wholly unrelated to their disabilities [are not entitled to] continued

79. See 20 U.S.C.A. § 1412(a)(21)(B)(x) (2000); 34 C.F.R. § 300.651(a)(10) (2001).

80. 20 U.S.C.A. § 1412(a)(11)(A)(ii) (2000).

81. 20 U.S.C.A. § 1412(a)(11)(C) (2000).

82. 34 C.F.R. § 300.2(b)(1)(iv) (2001).

83. See *supra* n. 53-82 and accompanying text.

84. The IDEA amendments were effective before the Washington statute was effective. Compare Pub. L. 105-17, § 201(a)(1) (relevant portions of IDEA-'97 effective on June 4, 1997) with Wash. Rev. Code § 28A.193.900 (effective date Mar. 30, 1998).

85. *Tunstall*, 5 P.2d at 706.

86. *Id.* (citing 20 U.S.C. § 1412(2)(B) (1994)).

87. See *supra* n. 58-78 and accompanying text.

88. 106 F.3d 559.

provision of educational services.”⁸⁹ The *Riley* court reasoned that Congress had not expressly conditioned receipt of IDEA funds on the provision of FAPE to children expelled for conduct not related to their disabilities.⁹⁰

This rationale does not support the *Tunstall* decision for two fundamental reasons. First, the *Riley* decision focuses on cessation of educational services to children expelled from school for conduct not related to their disabilities.⁹¹ The Washington statute at issue makes no such distinction. Instead, it ends all special education services to all incarcerated children with disabilities at age eighteen, whether or not the particular child was incarcerated for conduct related to her disability.⁹² Plainly stated, the *Tunstall* court relies on authority that does not support the proposition for which it is cited.

Second, whereas the *Riley* court found that the IDEA did not require continuation of FAPE for children expelled for conduct not related to a disability, the pre-1997 IDEA clearly required provision of special education to all children with disabilities through their twenty-second birthday, whether or not incarcerated,⁹³ and any then-existing exception to this obligation does not permit States to end special education services to the *Tunstall* class members with disabilities.⁹⁴ The *Tunstall* decision, for these two reasons, is distinguishable from *Riley*.

In addition, assuming that the *Riley* decision provides support for the statute at issue, subsequent congressional action calls into question the correctness of the *Riley* decision. Specifically, in 1997, Congress amended the IDEA to state that even children with disabilities who are expelled for conduct not

89. *Id.* at 561. For more discussion of the aftermath of the *Riley* decision and the 1997 IDEA amendments, see Theresa J. Bryant, *The Death Knell for School Expulsion: The 1997 IDEA Amendments to the Individuals With Disabilities Education Act*, 47 Am. U. L. Rev. 487 (1998).

90. *Riley*, 106 F.3d at 561.

91. *Id.*

92. For discussions of the often confusing relationship between special education law and criminal law, see e.g. Warboys, *supra* n. 7; Leone, *supra* n. 7; Mayes & Zirkel, *supra* n. 7; Robinson & Rapport, *supra* n. 7.

93. See 20 U.S.C. § 1412(2) (1994); see also *Letter to Teagarden*, 29 IDELR 973, 974 (OSEP 1997) (citing *Alexander S. v. Boyd*, 876 F. Supp. 773, 800-801 (D.S.C. 1995); *Donnell C. v. Ill. St. Bd. of Educ.*, 829 F. Supp. 1016, 1020 (N.D. Ill. 1993); *Green v. Johnson*, 513 F. Supp. 965, 976 (D. Mass. 1981)).

94. See *supra* n. 58-78 and accompanying text.

related to their disabilities are entitled to FAPE.⁹⁵ Although ordinarily a congressional amendment is presumed to indicate a change in the law,⁹⁶ that is not always the case. For example, a division of authorities addressing a question resolved by the amendment may indicate that the "subsequent amendment is intended to clarify, rather than change, the existing law."⁹⁷ Regarding cessation of special education to children with disabilities expelled for conduct not related to their disability, the *Riley* decision is contrary to prior decisions from the Sixth Circuit⁹⁸ and Fifth Circuit.⁹⁹ The Seventh Circuit¹⁰⁰ and arguably the Ninth Circuit¹⁰¹ are both in accord with *Riley*. Stepping in to resolve this circuit split, Congress stated that its amendment requiring continuation of services to expelled students was a "clarification[] of current law."¹⁰² In light of these clear statements of an intention to codify existing law, rather than create new law, the potency of the *Riley* precedent is significantly diluted.

B. The Statute at Issue in Tunstall Represents Bad Policy

Not only is the Supreme Court of Washington's decision in

95. 20 U.S.C. §§ 1412(a)(1) (2000), 1415(k)(5)(A) (2000); 34 C.F.R. §§ 300.121(d) (2001), 300.524(a) (2001). For more information on the IDEA's provisions concerning the discipline of children with disabilities, see e.g. Cynthia A. Dieterich & Christine J. Villani, *Functional Behavior Assessment: Process without Procedure*, 2000 B.Y.U. Educ. & L.J. 209; Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 Wash. L. Rev. 1 (2000); Allen G. Osborne, *Discipline of Special-Education Students Under the Individuals with Disabilities Education Act*, 29 Fordham Urb. L.J. 513 (2001); Terry Jean Seligmann, *Not as Simple as ABC: Disciplining Children with Disabilities Under the 1997 IDEA Amendments*, 42 Ariz. L. Rev. 77 (2000); Carl R. Smith, *Behavioral and Discipline Provision of the IDEA '97: Implicit Competencies Yet to Be Confirmed*, 66 Exceptional Children 403 (2000); Perry A. Zirkel, *The IDEA's Suspension/Expulsion Requirements: A Practical Picture*, 134 Educ. L. Rep. 19 (West 1999).

96. See *supra* n. 58-78 and accompanying text.

97. *In re Fielder*, 799 F.2d 656, 660-661 (11th Cir. 1986) (citing *In re Adams*, 761 F.2d 1422, 1427 (9th Cir. 1985) (citing cases)). Although such arguments are not favored, see *C. Bank v. First Interstate Bank*, 511 U.S. 164, 185-86 (1994) ("they should not be rejected out of hand as a source that a court may consider in the search for legislative intent."); *Andrus v. Shell Oil Co.*, 446 U.S. 657, 666 n. 8 (1980).

98. *Kaelin v. Grubbs*, 682 F.2d 595, 597 (6th Cir. 1982).

99. *S-1 v. Turlington*, 635 F.2d 342, 348 (5th Cir. 1981), *disapproved on other grounds by Honig v. Doe*, 484 U.S. 305, 317 (1988).

100. *Doe v. Bd. of Educ.*, 115 F.3d 1273 (7th Cir. 1997).

101. *Doe v. Maher*, 793 F.2d 1470, 1482 (9th Cir. 1986), *aff'd on other grounds sub. Honig v. Doe*, 484 U.S. 305, 316 (1988).

102. H.R. Rep. 105-95, 90 (1997); Sen. Rep. 105-17, 11 (1997).

Tunstall not legally supportable,¹⁰³ it is also bad public policy. This discussion of public policy is necessary because other States may be emboldened to adopt similar legislation by the United States Supreme Court's denial of certiorari in *Tunstall*.¹⁰⁴ This is particularly important because several states, in addition to Washington and California, have been historically reluctant to offer special education in adult correctional facilities.¹⁰⁵

Due to the inordinately high number of persons with disabilities in the criminal justice system,¹⁰⁶ close attention must be paid to any policy choice concerning the conditions of confinement of children and young adults in America.¹⁰⁷ Common goals, often concurrent and contradictory, of juvenile and adult corrections systems include rehabilitation and prevention, punishment and retribution, and deterrence.¹⁰⁸ Many responses to crime and delinquency may not be effective; in fact, some, such as "Scared Straight" shock-tactic programs, may "do more harm than good."¹⁰⁹ Given the fact that a poor education places a person at a high risk of incarceration¹¹⁰ and that incarcerating an individual is very costly,¹¹¹ states and local governments, if acting rationally, should pursue policies that will reduce the likelihood that inmates will re-offend upon

103. See *supra* Part III.C. stating that *Tunstall* is "bad law".

104. 532 U.S. 920 (2001).

105. Rita Kirshstein & Clayton Best, U.S. Dep't of Educ., *Survey of State Correctional Educational Systems: Analysis of Data from 1992 Field Test 3* (1996) (only 33 of 42 responding states offer special education in adult prisons).

106. See *Green v. Johnson*, 513 F. Supp. 965, 968 (D. Mass. 1981); Warboys, *supra* n. 7, at 30-37; Conward, *supra* n. 11, at 2448-50; Kelly, *supra* n. 7, at 761-65; Leone, *supra* n. 7; Mayes & Zirkel, *supra* n. 7, at 126; Robinson & Rapport, *supra* n. 7, at 19-21; Soliz & Cuttler, *supra* n. 7, at 267; *Better Services Could Reduce Need For Juvenile Justice*, Sch. Violence Alert (Mar. 6, 2001). According to limited data, at least one percent of adult inmates with disabilities receive special education services. Kirshstein & Best, *supra* n. 105, at 5. Kirshstein and Best's data is limited by a low response rate to this particular question on their survey instrument (19 of 50 states) and by the fact that their data does not distinguish between inmates who are eligible, age-wise, for IDEA and inmates who have aged out of IDEA eligibility.

107. See Greenwood, *supra* n. 11, at 83.

108. *Id.* at 78; see also Pattison, *supra* n. 28; Ira M. Schwartz, *Delinquency Prevention: Where's the Beef?*, 82 J. Crim. L. & Criminology 132 (1991).

109. Greenwood, *supra* n. 11, at 83; Mayes & Zirkel, *supra* n. 7, at 156-57.

110. See e.g. Conward, *supra* n. 11, at 2447; Kelly, *supra* n. 7, at 760; Stanley A. Karcz et al., *Abrupt Transitions for Youths Leaving School: Models of Interagency Cooperation*, 1 Techniques 497, 497 (1985); Webber, *supra* n. 11, at 97.

111. See e.g., Kelly, *supra* n. 7, at 758 (\$37,000 per year to incarcerate an individual in the California Youth Authority).

release. The literature makes clear that education, including special education, is a key part of an overall strategy to reduce criminal behavior by children and young adults.¹¹² Ignoring the educational needs of all incarcerated children,¹¹³ especially those with disabilities, is "morally and fiscally untenable."¹¹⁴ There is every indication that providing education to incarcerated individuals with disabilities will reduce the likelihood that they will again become involved in the criminal justice system.¹¹⁵ Any short-term savings justifying the statute at issue in *Tunstall*¹¹⁶ will likely be overwhelmed by the benefits foregone by not providing FAPE to children with disabilities over eighteen who are confined to adult prisons.¹¹⁷ The enactment of Washington Revised Code chapter 28A.193 in 1998 is thus a departure from sound public policy. The State of Washington would be well-advised to reconsider this statute, and her sister states are advised not to follow her lead.

112. See e.g. Mayes & Zirkel, *supra* n. 7, at 156 (citing studies); see also Warboys, *supra* n. 7, at 64-66; Conward, *supra* n. 11, at 1258-59; Greenwood, *supra* n. 11, at 83; Karcz, *supra* n. 110, at 497-99; Kelly, *supra* n. 7, at 770-73; Howard N. Snyder, *The Juvenile Court and Delinquency Cases*, *Future of Children* 53, 61 (Winter 1996); Schwartz, *supra* n. 111, at 138; *Better Services. . .*, *supra* n. 106.

113. The educational needs of minority students with disabilities in the adult criminal justice system are an additional area of concern to policy makers and practitioners. Given the overrepresentation of persons of color in the criminal justice system (see Pattison, *supra* n. 38; see also Conward, *supra* n. 11, at 2453-55; Snyder, *supra* n. 112, at 59-60) and in special education (see e.g. Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 Wisc. L. Rev. 1237; Robert Pressman, *A Comprehensive Approach to the Disparate Special Education Placement Rates of African-American and National-Origin Minority Youth*, 27 Clearinghouse Rev. 323 (1993); Dalun Zhang & Antonis Katsiyannis, *Minority Representation in Special Education: A Persistent Challenge*, 23 Remedial & Spec. Educ. 180 (2002)), any approach to end special education in adult correctional facilities must be considered carefully from a racial justice standpoint.

114. Kelly, *supra* n. 7, at 757.

115. See e.g. Karcz, *supra* n. 110, at 497.

116. In Washington, it costs approximately \$10,000 per student per year to provide special education in adult prisons. *Washington State Must . . .*, *supra* n. 16.

117. The cost differential between more punitive policies and more therapeutic/rehabilitative policies are often stunning. Professor Conward notes that one million dollars spent on early intervention would "prevent as many as 250 crimes." Conward, *supra* n. 11, at 2455 (citing Sandy Wilber, *Can Prevention Programs Stem the Tide of Delinquency?: Are We Penny-Wise and Pound Foolish?*, Juv. Just. <<http://www.juvenilejustice.com>>). A similar amount of money spent on incarceration would only prevent 60 crimes. *Id.*

IV. CONCLUSION

The State of Washington, in passing a statute ending special education for many persons with disabilities in adult prisons, made a poor policy choice. In *Tunstall v. Bergeson*, the Supreme Court of Washington erroneously rejected challenges to that statute based on the Individuals with Disabilities Education Act. Notwithstanding the denial of certiorari in *Tunstall* by the Supreme Court of the United States, other states should steer clear of the course plotted by the State of Washington.